Petition

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81-2018

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

[redacted]

Petitioners,

v.

[redacted]

Respondent,

EARL C. BERGER, Petitioner,

v.

THE UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORAI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR TINGLEY, LUCY I. F. JOHNSON, ELIZABETH A. MESSMER, MARY ALICE REKUCKI, and JOHN MORRISON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE UNITED STATES, Respondent.

EARL C. BERGER, Petitioner,

v.

THE UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTIONS PRESENTED

1. Whether a class action judgment depriving certain class members of property rights is valid under the Fifth Amendment of the United States Constitution when such judgment is rendered without prior notice to class members and without opportunity for a hearing, and also is in

conflict with two applicable federal statutes.

2. Whether a class action judgment, rendered by a Federal Court, is valid under the Fifth Amendment of the United States Constitution when such judgment deprives a class attorney, without prior notice to him or an opportunity for hearing, of his rights under a contingent fee contract with members of the class after success has been achieved under the terms thereof.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the caption hereof, Alan Y. Cole, Esq. and Isaac N. Groner, Esq., of Cole and Groner, P.C.,who were counsel of record for the class in the original action, took a position that was adverse to that of Petitioner Berger in the court below.

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Petitioners, who are named in the caption hereof, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 18, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, which the Court indicates will not be published, appears in the Appendix hereto (App. A).

Also relevant to this petition is the opinion of the Court of Appeals in March, et al. v United States, 165 U.S.App. D.C. 267, 506 F.2d 1306 (1974).

The Order of the District Court for the District of Columbia entered February 5, 1981, denying Petitioner Berger's Motion To Vacate Remand Judgment, also appears in the Appendix (App. B).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 18, 1982. A timely

suggestion as to the appropriateness of a rehearing en banc, made pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, was denied on February 19, 1982 (App. C), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,

Amendment V:

"No person shall be...deprived of life, liberty, or property, without due process of law..."

Tucker Act, 28 U.S.C. sec. 1346(a)(2) (1970) (in pertinent part):

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress..."

Public Law 89-391, April 14, 1966:

"An Act to correct inequities with respect to the basic compensation of teachers and teaching positions under the Defense Department Overseas Teachers Pay and Personnel Practices Act." (App. D)

STATEMENT OF THE CASE

I. The Congressional Mandate

In 1970, Virginia J. March and six other teachers employed by the Department of Defense in its Overseas Dependents Schools (ODS) system brought a class action in the District Court for the District of Columbia challenging, under the Act of April 14, 1966, Public Law 89-391, 80 Stat. 117, the methods used by their employer in fixing their basic salaries and other compensation, and also seeking back pay damages. Jurisdiction was invoked under the Tucker Act, 28 U.S.C. sec. 1346(a)(2) (1970).

The ODS teachers relied on particularly the following language of the 1966 Act which, inter alia, amended Sec. 5(c) of the Defense Department Overseas Teachers Pay and Personnel Practices Act (Act

of July 17, 1959, Public Law 86-91, 73 Stat. 213, 20 U.S.C. sec. 901 et seq.):

> "The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population." (Emphasis added.) (See App. D)

The key words "equal to" supplanted the term found in the 1959 Act, "in relation to," in the application of which the Department of Defense had fixed the ODS teachers' annual wage rate considerably below that paid stateside teachers.

The District Court permanently enjoined the Government from refusing to place and compensate ODS teachers in the steps most closely comparable to those in which they would have been placed in school districts in the United States, but denied the teachers' prayer for damages representing back pay.

On appeal, the Court of Appeals for the District of Columbia Circuit held that the teachers had a statutory right to

receive the back pay they demanded as damages. March, et al. v. United States, 165 U.S.App.D.C. 267, 506 F.2d 1306 (1970).

In construing the 1966 Act, the Court of Appeals said that it was important to give effect to the congressional purpose. The Court found that the House Committee on Post Office and Civil Service, in reporting the bill containing the 1966 Amendment, had clearly expressed the legislative intent:

> "This policy, and the mandatory payment of such equal salary rates, is consistent with, and will strengthen, the policy laid down by the Congress in the enactment of the Defense Department's Overseas Teachers Pay and Personnel Practices Act (Public Law 86-91), which thus far has not been effectuated in accordance with congressional intent." (Emphasis by Court)
>
> March, et al. v. United States, supra, 506 F.2d at 1313.

II. The Remand Judgment

After the Court of Appeals handed down its decision on November 12, 1974, and remanded the case, Messrs. Cole and Groner, counsel of record for the class, and Government attorneys, proceeding without court order, jointly prepared and submitted to the District Court a judgment which

included, inter alia, the following provision:

> "No ODS teacher shall recover more than $10,000 in damages pursuant to this Judgment. This Section shall prevail notwithstanding any other provision of this Judgment; so that if the computation of damages for an ODS teacher under the provisions of this Judgment shall exceed $10,000, she shall be entitled to recover no more than $10,000 damages from April 14, 1966 to date of this Judgment." (Emphasis added.)
>
> (Par. 3G of Sec. II (Judgment of Liability). of the Remand Judgment, entered June 30, 1975.)

The prepared judgment also provided for payment by each class member of 2% attorneys' fees based on gross recovery. Petitioner Berger was excluded from negotiations concerning such fees. Government attorneys as well as class counsel had knowledge of Petitioner Berger's existing contingent fee contract with the teachers calling for 25% attorneys' fees. Berger, who had previously rendered many years of service to the ODS teachers in their salary equalization cause, was unable to file the 1970 class action himself because of a rule of the District Court limiting practice before that court

to local residents. Acting under the authority of his own contingent fee contract with ODS teachers, Berger had entered into a separate agreement with Messrs. Cole and Groner, Washington, D. C. attorneys, to have them prosecute the class action in the District Court for the District of Columbia.

The prepared judgment was attached to a joint motion requesting its entry by the court, and filed June 19, 1975.

A hearing was held on June 25, 1975, but it was limited to the question of reasonableness of the 2% attorneys' fees as thus agreed upon by Cole and Groner and Government attorneys. The court was informed then by Isaac N. Groner, Esq., the only attorney present for the class, of Berger's 25% contingent fee contract. Prior notice of such hearing was not given to the class, nor to Berger.

The prepared judgment as thus submitted was signed by the court on June 27, 1975, and entered on June 30, 1975.

III. The Present Case

On December 18, 1980, Petitioner Berger filed a Motion To Vacate Remand Judgment on grounds that the June 30, 1975 judgment was

void because of denial of due process and lack of notice and hearing under Rule 23(e) of the Federal Rules of Civil Procedure. 1/

On February 5, 1981, the District Court entered its Order denying Berger's motion on grounds that it was untimely and also barred by laches and res judicata, and that the attorneys' fees provided in such judgment were and are appropriate. (App. B)

On Berger's appeal, the Court of Appeals for the District of Columbia Circuit decided that the prepared judgment proffered by both sides in 1975 did not represent a compromise, and therefore Rule 23(e) of the Federal Rules of Civil Procedure did not apply. The Order of the District Court was affirmed. (App. A)

1/ Rule 23(e), Fed.R.Civ.P., provides:

> "Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Decisions Of This Court Concerning The Requirements Of Procedural Due Process.

This Court has stated that "the two central concerns of procedural due process (are) the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." Marshall v. Jerrico, 446 U.S. 238, 242 (1980). (Emphasis added.) Therefore, at a minimum, the Due Process Clause of the Fifth Amendment of the United States Constitution requires that deprivation of life, liberty, or property by adjudication be preceded "by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). (Emphasis added.)

In March, members of the class whose accrued back pay damages had exceeded $10,000 during the protracted period of litigation were entitled to notice and the opportunity to be heard before the Judgment of June 30, 1975 was entered

limiting their recovery to $10,000. Mullane v. Central Hanover Bank & Trust Co., ibid. See also Boddie v. Connecticut, 401 U.S. 371 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Armstrong v. Manzo, 380 U.S. 545 (1965); Schroeder v. City of New York, 371 U.S. 208 (1962); Grannis v. Ordean, 234 U.S. 385 (1914). March class members were not accorded their constitutional rights.

The District Court's limitation of individual recovery to $10,000, without prior notice and opportunity for hearing, "violated the most rudimentary demands of due process of law." Armstrong v. Manzo, supra, at 550. See also Garfield v. Goldsby, 211 U.S. 249 (1908), where the Court said: "The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law." At 262.

The Remand Judgment of June 30, 1975 not only fails to meet the requirements of procedural due process, but it also has enabled the Department of Defense, once again, to frustrate the intent of

Congress as expressed in Public Law 89-391. In Vallely v. Northern Fire and Marine Insurance Co., 254 U.S. 348 (1920), the Court said:

> "Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. Elliott v. Peirsol, 1 Pet. 328, 344; Old Wayne Mutual Life Association v. McDonough, 204 U.S. 8." At 353-354.

II. The Decision Below Also Conflicts With The Decisions Of Other Courts Of Appeals As To The Proper Interpretation Of The Tucker Act.

Apart from the denial of due process, the decision below also conflicts with the decisions of other Courts of Appeals as to the proper interpretation of the Tucker Act where a district court, having initially accepted jurisdiction of a monetary claim asserted thereunder, proceeds to adjudicate the claim even though damages have exceeded $10,000 during the course of litigation. In March, the Dis-

trict Court accepted without providing prior notice and opportunity for hearing the provision in the proposed judgment which limited class members to individual recovery of $10,000. (See page 6, this Petition.) This provision in effect decreed to those class members whose statutory back pay damages had exceeded $10,000 during the period of litigation: "Although you may be entitled under Public Law 89-391 to back pay damages in excess of $10,000, you shall recover no more than $10,000." 2/

A different result was reached by the United States Court of Appeals for the Eighth Circuit in Giordano v. Roudebush, 617 F.2d 511 (1980), an action brought against the Administrator of Veterans' Affairs, the United States of America, and others, by a discharged V.A.

2/ The period covered by the judgment was from April 14, 1966, the date of enactment of Public Law 89-391, to June 30, 1975, the date of entry of the District Court's remand judgment.

physician. Dr. Giordano, the plaintiff, alleged denial of due process and, at the time the complaint was filed, sought award of back pay in the amount of $6,000 and reinstatement. During the course of the litigation, Dr. Giordano's accrued back pay exceeded $10,000.

On the issue of damages, the district court in Giordano ultimately decided that, under the Tucker Act, it was without jurisdiction to enter a judgment against the United States for back pay in excess of $10,000 and ordered the damage claim transferred to the Court of Claims. However, the district court ruled on the non-monetary issues in the case. On appeal, the Government contended that the district court had erred in not transferring the entire case to the Court of Claims. 3/

The Court of Appeals for the Eighth

3/ In Giordano, suit was filed after a 1972 amendment to the Tucker Act whereby Congress gave the Court of Claims jurisdiction over a government employee's entire claim, thus obviating the necessity for an illegally discharged employee to file an additional suit in a Federal district court to obtain reinstatement. See Giordano v. Roudebush, fn. 6 at 514.

Circuit, in a careful and penetrating analysis of the jurisdictional separation between the District Court and the Court of Claims under the Tucker Act, held that:

> "(T)he Court of Claims' exclusive jurisdiction over monetary damages exceeding $10,000 does not deprive a federal district court of jurisdiction over all equitable claims asserted in a complaint; nor does it require a party to waive his claim for monetary damages in excess of $10,000." (Emphasis added.)
>
> Giordano v. Roudebush, supra, 617 F. 2d at 514.

Answering the Government's further contention that if the district court were to retain jurisdiction over Dr. Giordano's equitable claims plaintiff must waive all damages over $10,000 since to do otherwise would in effect allow him to split his claim for relief, the Eighth Circuit Court said that there would have been an impermissible splitting of plaintiff's monetary claim in Giordano only if the district court had retained jurisdiction over the first $10,000 and transferred the remainder to the Court of Claims.

The Court cited, at 515, the case of State of Washington v. Udall, 417 F.2d 1310

(9th Cir. 1969), rev'd on other grounds, as an example of impermissible splitting of a claim under the Tucker Act. There, the State of Washington carved out in a suit for damages a parcel of irrigable land from a much larger acreage of state-owned lands which the United States Secretary of the Interior had determined was not entitled to the delivery of water from a federal water project. The Ninth Circuit Court had stated in that case:

> "The District Court correctly decided that the State (of Washington) impermissibly split its claim for damages under the Tucker Act, 28 U.S.C. sec. 1346(a)(2), in an attempt to limit the amount in controversy to less than $10,000, the jurisdictional limit specified by the Act." At 1320.

Thus distinguishing State of Washington v. Udall, supra, the United States Court of Appeals in Giordano concluded that the District Judge "did not err in his findings or construction of the statutory scheme." Giordano v. Roudebush, supra, 617 F.2d at 517.

In the present case, the United States Court of Appeals for the District of Columbia Circuit in effect has upheld a dif-

ferent interpretation that was placed by the United States District Court for the District of Columbia on the limitations of the Tucker Act.

III. The Decision Below Sanctions The Violation Of Petitioner Berger's Right To Due Process Of Law With Respect To His Fee Contract With Members Of The Class.

Failure to give Petitioner Berger notice and an opportunity for a hearing pursuant to his fully matured contract for attorney's fees violated his constitutional rights. "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." Lynch v. United States, 292 U.S. 571, 579 (1934).

Berger had a legitimate claim of entitlement to his 25% legal fee based on his achievement of success in behalf of the ODS teachers. What the District Court would have finally allowed, after notice to Berger and a full evidentiary hearing on the matter of fees, is another matter.

It is a point in the proceedings that was never reached. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). (Emphasis added.)

The legal effect of a judgment such as the Remand Judgment which was entered June 30, 1975 in March has been described by the United States Court of Appeals for the Fifth Circuit thus:

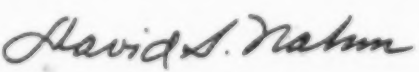
> "We believe that a judgment*** reached without due process of law is without jurisdiction and void, and attackable collaterally***by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition."

Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949); cert. den., 338 U.S. 816.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



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April 26, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

No. 81-1207
Civil Action No. 03437-70

VIRGINIA J. MARCH, *et al.*

v.

THE UNITED STATES
EARL C. BERGER,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Senior Circuit Judge; TAMM and WALD, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the order of the District Court which denied appellant's Motion to Vacate Remand Judgement entered June 30, 1975 is hereby affirmed for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

March v. *United States*, No. 81-1207

MEMORANDUM

In this action, attorney Earl Berger asks us to set aside as void a district court judgment entered by Judge June Green more than six years ago in a class action by teachers employed by the Department of Defense in its Overseas Dependents Schools. Berger, who originally referred the case to the counsel of record, was "of counsel" to the plaintiff class. The district court judgment assessed damages and 2% attorneys fees after a decision by this court which affirmed the government's liability and ordered that back pay be awarded. *March* v. *United States*, 506 F.2d 1306 (D.C. Cir. 1974). Berger claims that the judgment, the terms of which were agreed to by counsel on both sides and presented to the court for approval, was in fact a settlement effected in violation of the notice requirements of Federal Rule of Civil Procedure 23(e): "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Berger asserts that the judgment should now be declared void for lack of such notice to the class. Its vacation would, in turn, help clear the way for an award of attorney's fees of 25% of the class recovery to Berger; an amount he claims to have negotiated in contracts with some individual class members. Counsel for both plaintiffs and for the United States deny that the judgment represents a compromise subject to the provisions of rule 23(e). Rather, they argue, it is, as it purports to be, a judgment "which most faithfully and effectively implements the Opinion of the Court of Appeals with due and just regard to the interests and rights of all parties." We agree.

In *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979), the court noted that "the nature of the lower court's decree is usually obvious as a factual matter and not subject to dispute by the parties." 576 F.2d at 1170. But, as the court there also observed, that is "decidedly not the case here." *Id.* In *Pettway* — as well as here — the inquiry centered on the differing procedural safeguards accompanying settlement and judgment. "[T]he law accords special protections, primarily procedural in nature, to individual class members whose interests may be com-

promised in the settlement process. . . . Nevertheless, because the potential for abuse is much greater when class actions are resolved through a settlement, the procedural protections applicable to settlements are not utilized in the judgment context." 576 F.2d at 1169. Judge Goldberg adopted a "functional approach" where, as here, "the events leading to a back pay award do not coincide with the paradigmatic class action settlement, yet plaintiff's counsel did in fact agree to the amount of the final award." 576 F.2d at 1173.

In this case, although the judge accepted in its entirety the damage proposal proffered by counsel on both sides, the Joint Motion for Entry of Judgment came only after extensive district and appellate court proceedings on the merits — the record consumes several volumes — and the judgment observed faithfully the computation method defined by the Court of Appeals in its opinion affirming liability and ordering back pay awards. Judge Goldberg's approach and the language of rule 23(e) itself focus on whether a class attorney has negotiated a compromise of the rights of class members. 576 F.2d at 1174. Here, because the judgment simply applied this court's computation formula, no "compromise" was effected; indeed there is no indication whatever in the damages portion of the judgment of any give and take of negotiation. The parties put in the form of a district court order the criteria established by this court as the appropriate basis for back pay awards and identified the relevant figures, objectively derived, to flesh out those criteria. Even if the district court had prepared the judgment on its own, it would of necessity have had to obtain these figures from the parties. [1] At oral argument, appellee's counsel indicated that attorney's fees had been the subject of some negotiation. But, while Judge Green ultimately adopted in their entirety both the damage proposal and the recommendation as to

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[1] It is possible that counsel here committed a technical violation of Federal Rule of Civil Procedure 58: "Attorneys shall not submit forms of judgment except upon direction of the court. . . ." The purpose of the prohibition is to prevent "needless expenditure of time and effort;" unsolicited attorney submissions promote delay "except in special cases where counsel's assistance can be of real value." Fed. R. Civ. P. 58 note on 1963 Amendment. The submission here was clearly valuable, however; it promoted expeditious resolution rather than delay, as evidenced by Judge Green's subsequent

attorney's fees, the record of the remand hearings shows that she independently examined the attorney's time records to determine "whether two percent is high or whether it . . . should be something else." Reporter's Transcript of June 25, 1975, Appendix for Appellant at 28, 39.

Specifically, Berger asserts that rights of class members were compromised in the following ways: "there was not only a waiver of back pay claims in excess of $10,000, but there was also waiver of such things as costs, any claim for interest or for damages for the reduced value of the dollar because of ongoing inflation, and attorneys' fees were reduced from the 25% stipulated in the teachers-Berger contingent fee contract, to 2%." Brief for Appellant at 11. Berger's characterization of the agreement, however, is erroneous in several respects. First, the judgment records no waivers of any kind. Although the judgment provides that no plaintiff "shall recover more than $10,000 in damages," this merely reflects the limits of the Tucker Act, under which the court took jurisdiction and which covers only claims "against the United States, not exceeding $10,000 in amount." 28 U.S.C. § 1346(a)(2). Further, contrary to Berger's allegations, class members would have been entitled to interest only if the government appealed the judgment. *See* 31 U.S.C. § 724a; *cf. United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) ("interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract"). Finally, the attorneys fee provision of the judgment cannot be deemed to have compromised rights of class members because it provided for a 2% fee rather than a 25% fee. Also, the attorneys fee portion of the judgment is most clearly the product of the independent determination of the district court judge.

For the foregoing reasons, rule 23(e) does not apply to the judgment here challenged, and we therefore reject the appellant's urgings that it be set aside.

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ratification. Further, as indicated above, the submission, in large part, would of necessity have had to have been requested by counsel by the court. *Cf. Christiansen* v. *Christiansen*, 72 F. Supp. 424 (N.D. Tex. 1947) (Counsel asked to prepare and court accepted judgment reflecting "descriptions, profits, expenses, and appropriate legal divisions within the terms of the majority opinion [of the Court of Appeals]").

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 3437-70

VIRGINIA J. MARCH *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

FEB 5 1981
JAMES F. DAVEY, Clerk

ORDER

Earl C. Berger having on his own behalf served on December 18, 1980 a Motion to Vacate Remand Judgment entered herein on June 30, 1975; the Court having fully considered Movant's supporting papers and the opposition papers filed by both Plaintiffs and Defendant; and the Court being fully advised in the premises and having determined that the Motion is untimely and also barred by laches and res judicata, and that the attorneys' fees provided in such Judgment were and are appropriate, and that additional fees could not have been and cannot be provided, and that Movant's contentions are in any event without merit, it is, by the Court, this 5th day of February, 1981,

ORDERED that the Motion to Vacate Remand Judgment shall be, and the same hereby is, denied.

/s/ _____
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

No. 81-1207

VIRGINIA J. MARCH, *et al.*

v.

THE UNITED STATES
EARL C. BERGER, *Appellant*

Civil Action No. 03437-70
ARGUED 1-13-82

BEFORE: Robinson, Chief Judge, Bazelon, Senior Circuit Judge, Wright Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

ORDER

The suggestion of appellant Earl C. Berger for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

FILED FEB 19 1982

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Bork did not participate in the foregoing order.

APPENDIX D

PUBLIC LAW 89-391 — APRIL 14, 1966

Public Law 89-391

AN ACT

To Correct Inequities With Respect To The Basic Compensation Of Teachers And Teaching Positions Under The Defense Department Overseas Teachers Pay And Personnel Practices Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 4(a)(2) of the Defense Department Overseas Teachers Pay and Personnel Practices Act (73 Stat. 214; Public Law 86-91; 5 U.S.C. 2352(a) (2)) is amended to read as follows:

> "(2) the fixing of basic compensation for teachers and teaching positions at rates euql to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population;".

(b) Section 5(c) of such Act (73 Stat. 214; Public Law 86-91; 5 U.S.C. 2353(c)) is amended to read as follows:

"(c) The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population."

(c) Section 5 of such Act (73 Stat. 214; Public Law 86-91; 5 U.S.C. 2353) is amended by adding at the end thereof the following new subsection:

"(c) On or before the 15th day of January in each calendar year beginning after the date of enactment of this subsection, the Secretary of Defense shall report to the respective Committees on Post Office

and Civil Service of the Senate and the House of Representatives the following information —

"(1) the number of teachers separated from teaching positions subsequent to the close of the immediately preceding full school year;

"(2) the number of such separated teachers who returned to the United States;

"(3) the number of such separated teachers placed in positions as teachers in the United States following such separation;

"(4) the number of such separated teachers returned to positions as teachers in the United States under voluntary reciprocal interchange agreements with school jurisdictions in the United States;

"(5) the number of such separated teachers placed in positions as teachers in the United States through special placement assistance programs of the Department of Defense and the military departments;

"(6) the number of such separated teachers who (A) were separated at their own request and (B) were separated involuntarily;

"(7) the number of such separated teachers who had served in teaching positions (A) three years or more and (B) five years or more;

"(8) the number of new teachers appointed to teaching positions at the beginning of the school year current at time of the report; and

"(9) the number of such new teachers obtained through voluntary reciprocal interchange agreements with school jurisdictions in the United States."

SEC. 2. The amendments made by the first section of this Act shall become effective on the first day of the first pay period which begins after the date of enactment of this Act.

Approved April 14, 1966.

Opposition

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81-2018

IN THE

Supreme Court of the United States

October Term, 1981

EARL C. BERGER,
Petitioner,

v.

THE UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

BRIEF FOR RESPONDENTS VIRGINIA J. MARCH, *et al.* IN OPPOSITION

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* The caption of this case as set forth in the Petition for a Writ of Certiorari ("Pet. for Cert.") is erroneous. This Brief bears the proper caption, as determined by the Office of the Clerk of this Court. Parties to the proceedings in the Court of Appeals who are not named in the caption were plaintiffs-appellees Virginia J. March, John H. Lehr, Arthur Tingley, Lucy I. F. Johnson, Elizabeth A. Messmer, Mary Alice Rekucki and John Morrison, on behalf of themselves and all others similarly situated.

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STATUTORY PROVISIONS

The Tucker Act, 28 U.S.C. § 1346(a)(2), provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress . . . .

Title 31 U.S.C. § 724a provides in pertinent part as follows:

> [I]nterest on a judgment of a district court to which the provisions of Section 2411(b) of Title 28 apply [which applies to "all final judgments rendered against the United States in actions instituted under Section 1346 of this title"], payable from this appropriation, shall be paid only when such judgment becomes final after review on appeal or petition by the United States . . . .

STATUTORY PROVISIONS CONTINUED

Fed. R. Civ. P. 23(e) provides as follows:

Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

No. 81-2018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL C. BERGER,

Petitioner,

v.

THE UNITED STATES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS VIRGINIA J. MARCH, et al. IN OPPOSITION

STATEMENT

Petitioner Earl C. Berger, an attorney who was "Of Counsel" to the class action

plaintiffs,[1/] seeks for a second time to bring before this Court his efforts to obtain a larger attorneys' fee award and to raise other objections to the District Court's final Judgment entered June 30, 1975 in this class action. Respondents, the class plaintiffs, plaintiffs-appellees below, and the United States, defendant-appellee below, have vigorously opposed Berger's repeated efforts to disturb the Judgment.

This class action for back pay and other relief was commenced on November 20, 1970 by plaintiffs Virginia J. March, et al., on behalf of approximately 19,500 teachers employed on or after April 14,

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1/ Counsel of record for the plaintiff class throughout this litigation has been the Washington, D.C. law firm of Cole and Groner, P.C. See paragraph 1E of the District Court's Judgment entered June 30, 1975, included in the Appendix for Plaintiffs-Appellees ("Plaintiffs' App.") filed with the Court of Appeals, which so defines "Plaintiffs' counsel" (Plaintiffs' App. 22).

1966 by the Department of Defense in its Overseas Dependents Schools. After two years of litigation in the District Court followed by cross-appeals, the Court of Appeals resolved the issue of the Government's liability for back pay in favor of the plaintiffs and remanded the case to the District Court for further proceedings consistent with its opinion. March v. United States, 506 F.2d 1306 (D.C. Cir. 1974).

Following remand, and with Berger's full knowledge and approval, the attorneys for the plaintiff class and the Government engaged in extensive discussions which culminated, on June 19, 1975, in their joint submission to the District Court of a proposed judgment implementing the decision of the Court of Appeals. The proposed judgment contained, inter alia, a provision awarding as attorneys' fees to plaintiffs' counsel, including Berger, 2% of the gross

recovery of each member of the class. The District Court sua sponte held a hearing on the issue of attorneys' fees on June 25, 1975, and on June 30, 1975 the Judgment was entered in substantially the form submitted.

Some 71 days later, on September 9, 1975, Berger filed with the District Court a lengthy Petition to Amend Judgment. Proceeding "in propria persona, rather than as an attorney of record" (Plaintiffs' App. 40), Berger raised three principal objections to the Judgment. First, Berger asserted that the District Court was required to award as attorneys' fees the 25% contingent fee referred to in certain individual retainer agreements obtained from a small percentage of the class, even though the retainers expressly authorized the district court to establish the appropriate fee.[2/]

2/ The retainers, a copy of one of which was included in the Appendix for Appellant Berger ("B. App.") in the Court of Appeals, provided in pertinent part for attorneys'

(continued p. 5)

Second, Berger objected to the provision of the Judgment limiting individual damage recoveries to $10,000, a limitation imposed by the Tucker Act, 28 U.S.C. § 1346(a)(2), under which plaintiffs had invoked federal jurisdiction. Third, Berger objected to the absence from the Judgment of a provision awarding interest on such recoveries to run against the Government, although the applicable federal statute, 31 U.S.C. § 724a, precluded the award of interest in cases brought under the Tucker Act except where a judgment had become final after review on appeal by the Government.

Both plaintiffs and the Government opposed Berger's Petition, and the affidavits submitted to the District Court established without dispute that Berger had approved the terms of the Judgment, including

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2/ (continued)
fees of "one-fourth of the gross recovery . . . or, if the Court having jurisdiction, on its own motion, orders a different percentage or fee, then such different percentage or fee shall be deducted" (B. App. 74a) (emphasis added).

its provision for a 2% fee award, prior to its submission to the District Court (Plaintiffs' App. 79-94). By order filed November 7, 1975, the District Court granted plaintiffs' motion to strike the Petition. On Berger's appeal, after full briefing, the Court of Appeals summarily affirmed that order. March v. United States, No. 75-2262 (D.C. Cir. July 1, 1976). Berger then filed a petition for a writ of certiorari which was denied by this Court. Berger v. United States, 429 U.S. 1074 (1977) (No. 76-693).

On December 22, 1980, almost four years after exhausting his appeals from the District Court's denial of his Petition and at a time when the Judgment had been substantially implemented, Berger filed with the District Court a Motion to Vacate Remand Judgment.[3/] In his Motion, Berger asserted

3/ By this time, more than 20,000 members of the plaintiff class had received and accepted damage payments under the Judgment in an aggregate amount exceeding $64,000,000 (Plaintiffs' App. 112-15).

for the first time that the Judgment was in fact a settlement of the class action and that it should be declared void as having been entered without prior notice to the class pursuant to Rule 23(e), Fed. R. Civ. P. Berger claimed that, as a result of the lack of Rule 23(e) notice, class members had been deprived of property without due process of law in that their rights to receive individual damage recoveries in excess of $10,000 and awards of interest against the government had been compromised and the 25% contingent fee referred to in the retainer agreements had been reduced to 2%. Thus, in substance, Berger's 1980 Motion presented to the District Court a second time the very objections raised in his 1975 Petition.

Both plaintiffs and the Government opposed Berger's Motion. By order filed February 5, 1981, the District Court denied it, "having determined that the Motion is

untimely and also barred by laches and res judicata, and that the attorneys' fees provided in [the] Judgment were and are appropriate, and that additional fees could not have been and cannot be provided, and that Movant's contentions are in any event without merit . . . ." (Pet. for Cert. 5a).

On Berger's appeal, the Court of Appeals affirmed the District Court's order. March v. United States, No. 81-1207 (D.C. Cir. January 18, 1982). The Court of Appeals held that, because the Judgment was the result of extensive litigation in the district and appellate courts and effected no compromise of rights of class members, the Fed. R. Civ. P. 23(e) procedural protections applicable in the context of a class action settlement did not apply to the Judgment. Indeed, the court determined that the Judgment was, "as it purport[ed] to be, a judgment 'which most faithfully and effectively implement[ed] the Opinion of the Court of Appeals [506 F.2d 1306]

with due and just regard to the interests and rights of all parties'" (Pet. for Cert. 2a).

With respect to Petitioner Berger's three objections to the Judgment, the court found that neither the Judgment's provision limiting individual recoveries to $10,000, which reflected the applicable Tucker Act jurisdictional limitation, 28 U.S.C. § 1346(a)(2), nor the absence from the Judgment of a provision awarding interest, to which plaintiffs were not entitled because the Government had not appealed to the Judgment, 31 U.S.C. § 724a, nor the District Court's independent determination to award 2% attorneys' fees, as opposed to the 25% claimed by Berger, could be deemed to have compromised any rights of class members.

ARGUMENT

The decision of the Court of Appeals is correct, does not conflict with any decision of this Court or any other court of

appeals, and involves no issue of general importance. The Petition for a Writ of Certiorari should therefore be denied.

1. The Court of Appeals carefully determined that, on the particular facts presented, the procedural protections afforded by Fed. R. Civ. P. 23(e) to individual class members whose rights may be compromised in a class action settlement were not applicable to the Judgment. Although jointly submitted to the District Court by the parties, the Judgment was the result of extensive litigation, was entered on remand after the issue of liability had been decided by the Court of Appeals, "observed faithfully the computation method defined by the Court of Appeals in its opinion . . . ordering back pay awards" (Pet. for Cert. 3a), and, accordingly, effected no compromise of the rights of class members.

2. In rejecting Petitioner's three objections to the Judgment, the Court of

Appeals simply gave recognition to the Tucker Act's limitation of the District Court's jurisdiction to claims "against the United States, not exceeding $10,000 in amount", 28 U.S.C. § 1346(a)(2),[4/] and to the applicable federal statute precluding awards of interest against the Government in the circumstances of this case. 31 U.S.C. § 724(a). The court also recognized that, as an obvious factual matter, members of the plaintiff class could not have been prejudiced by the award of 2%

4/ Contrary to Petitioner's suggestion (Pet. for Cert. 12-14), the court of appeals' straightforward application of the Tucker Act limitation does not conflict with the decision of the United States Court of Appeals for the Eighth Circuit in Giordano v. Roudebush, 617 F.2d 511 (1980). In Giordano, an individual action for reinstatement and back pay by a discharged employee of the Veterans Administration, the court held that it was permissible for the district court, which was without jurisdiction under the Tucker Act to award plaintiff damages in excess of $10,000, to transfer the entire damage claim to the Court of Claims while retaining jurisdiction of plaintiff's non-monetary claims. The district court's lack of jurisdiction of monetary claims in excess of $10,000 was not disputed by the parties.

rather than 25% attorneys' fees, and that the fee award was, as it should have been, the result of the independent determination of the District Court after conducting a hearing on that very issue.

3. With respect to Petitioner's claimed "entitlement" (Pet. for Cert. 16) to a 25% fee award, the facts of record, particularly the affidavits submitted to the District Court in connection with Berger's 1975 Petition to Amend Judgment, demonstrate that Berger approved the terms of the Judgment, including its provision for 2% fees, prior to its submission to the District Court. Moreover, the individual retainer agreements on which Berger bases such claim specifically authorized the District Court to determine the appropriate fee award, which is precisely what happened.

4. As is apparent from the foregoing and from the Petition for a Writ of Certiorari, this case rests principally upon

its unique factual circumstances. No issue of general importance is presented.

Plainly, the Petition for a Writ of Certiorari presents no grounds warranting that Berger's efforts to disturb the Judgment, which have now been twice reviewed and twice rejected on their merits by both the District Court and the Court of Appeals, should be further reviewed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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